**Foreign Investment, Jobs and National Security: The CFIUS Process**

**Testimony before the House Committee on Financial Services, Subcommittee on Domestic and International Monetary Policy, Trade, and Technology**

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Thank you for the opportunity to appear today to discuss the CFIUS process. I am the President of the National Foreign Trade Council, a trade association of some 300 global companies that supports an open, rules-based trading system and opposes unilateral sanctions. My comments today will address the current acquisition involving Dubai Ports World and a number of proposals to amend current law.

With respect to Dubai Ports World, the Administration has explained in some detail the reasons for its decision to approve the transaction. The National Foreign Trade Council supports that decision and welcomes the further 45-day review which we expect, based on available information, to confirm it. Rather than repeat arguments that have already been presented, let me make two brief points.

First, the American business community yields to no one in its support of national security and particularly port security. We have an enormous amount at stake in protecting our ports and the cargo transiting through them. There are serious issues relating to port security, but we do not believe that this issue of ownership over the operation of port terminals is one of them. We believe Congress should take a hard look at our real port security problems, and would be happy to work with the relevant committees in that regard.

Port security is the province of the Coast Guard and Customs and Border Protection in the Department of Homeland Security. Without question, they cannot succeed without close ongoing cooperation with terminal operators. All indications are that DP World has a good record of cooperation, that it has committed not to change that, and that the United Arab Emirates government likewise has a good record of cooperating with the United States government both on port security and on the war against terrorism generally. The business community is no position to second-guess the Department of Homeland Security, the Department of Defense, the Department of State, and the intelligence community on those issues.

Second, port terminal operations have been substantially foreign-owned for some time without complaint. It appears that the problem this time is not with foreigners in general but with specific foreigners. That is the main reason why the NFTC has spoken out in support of the President on this issue -- this is a terribly negative message we are sending to the Arab nations in the Middle East. Simply put, those who oppose this acquisition are implying that it doesn't matter if you cooperate with us on fighting terrorism and on other matters; it doesn't matter if you are negotiating a free trade agreement with us; it doesn't

even matter if you have donated $100 million to Katrina relief as I understand the UAE has; we're going to treat you as a terrorist-supporting nation anyway.

It is a fair point that the UAE's record is not unblemished, particularly if one looks only at the pre-9/11 period. Many nations, including our own, had lax practices then. We have gotten better since then, and I would like to think others have as well. In evaluating our current relationships, we should place greater weight on whether a government has made changes and cooperated with us since 9/11. Failing to distinguish between nations that have been helping us since 9/11 and those that have not sends a troubling signal to the world and the region that would be a major setback to our efforts to promote peace and economic growth in the Middle East.

The NFTC has worked hard in support of the President's proposal for a Middle East Free Trade Agreement (MEFTA) and for a U.S.-UAE FTA as an integral part of that. The attacks on this acquisition make reaching those agreements more difficult. Blocking it could well put them out of reach entirely. In doing so, we would pass up a chance to promote jobs, economic growth, and ultimately peace in the region.

**CFIUS Reform**

With respect to CFIUS reform proposals, let me make a few comments on the current process and then address several proposed reforms.

From the perspective of someone who was involved in this process in the last Administration, it appears to me that it continues to work effectively and as Congress originally intended, although it would be fair to say that CFIUS has repeatedly demonstrated a tin ear for the politics of these cases.

Normally, when a proposed acquisition is notified to CFIUS, relevant agencies are advised and the appropriate officials in each of them analyze the case from their perspective. Meetings are held, and if no one identifies a problem, that is normally the end of it. If problems are raised, further investigation, interagency discussion, and conversation with the applicant generally ensue. That effort is usually led by the agency that identified a problem. Often, the applicant is willing to make commitments that address any concerns the government has raised. In the IBM-Lenovo case last year, for example, there was considerable discussion about security procedures that would guarantee the acquiring company could not access technology that was not part of the acquisition but which was located in the same physical area. In another earlier case, a separate Board of Directors was created to ensure continued American control of some sensitive military contracts that the acquired company was undertaking.

One of the results of these negotiations is that most cases do not go to the President; nor should they if there are no problems or if they have been resolved. It does not appear that the DP World case deviated significantly from this model. In retrospect, the difference is that this case took on a degree of public controversy that was clearly unanticipated by CFIUS.

While the way this case has played out has been unfortunate and probably avoidable, that does not by itself make a compelling case for a different relationship between CFIUS and the public or the Congress. The United States has historically followed – and benefited greatly from – an open investment policy. The CFIUS process was created to permit government intervention for compelling national security reasons. Congress wisely chose to insulate the process from politics and publicity both because of the sensitivity of the data about an acquisition the government would be obtaining and because of the sensitivity surrounding any national security issues that were identified and any solutions proposed to address them.

Changing that approach should be undertaken only with the greatest care. While the United States remains an attractive location for both portfolio and direct investment, the investment community, both here and abroad, is notoriously sensitive to political winds and rumors. Ill-considered or poorly drafted proposals could easily have a significant negative impact on future investment. With a current account deficit projected at about $900 billion this year, this concern should not be taken lightly. We will find more and more foreign investment coming here, and we will find it increasingly as equity investment. That will make the CFIUS process a more prominent one, but it will also make the consequences of negative signals to the markets all the greater.

CFIUS has historically made public very little information about its deliberations or decisions, and its record of consultation with the Congress is likewise limited. The issue of whether it should do more either while a case is pending or after a decision has been made has always been a difficult one. On the one hand, failure to consult and provide information to Congress and the public can lead to exactly what has happened in the DP World case. On the other, providing information can often lead to either leaks or Congressional demands for involvement in the decision making process, which would open the process to political pressures and, in my judgment, would be unwise.

The risk of leaks should not be minimized. The information reviewed in a case is often highly sensitive in that it reveals internal details of corporate operation and finance that could have significant value to competitors. In addition, agreements reached between the government and the applicant on new security procedures to be put in place, for example, can also be sensitive and could compromise the very security they are designed to provide were they to become public.

Having worked on Congressional staffs in both the House and the Senate for more than twenty years, I understand and have a great deal of sympathy for Congress' desire for full disclosure and extensive consultation. In this circumstance, however, I believe it would be a mistake, both because of the possibility of sensitive information becoming public and because it would likely produce calls in the Congress – which appeared even before the DP World case – for a role in the decision making process.

That would be an even bigger mistake than consultation. This provision was written during a period of paranoia about Japanese acquisitions, but its drafters nevertheless

understood very well that it made no sense for Congress to review and opine on specific investments. That would be micro-management in the extreme that would guarantee the injection of political criteria into a process that should be based strictly on national security.

At the same time, it is also true that Congressional oversight of the process has been sadly lacking since 1987, and I would encourage the Committee to study the process and past cases more closely – not simply in the context of the current case but over the life of the provision.

These comments reflect my concern about many of the proposals that are currently floating around – required submission of reports and findings to Congress, giving Congress additional time to vote on a resolution revoking the transaction, permitting Congress to order an investigation, requiring periodic reporting on all reviews. The only one I believe would not be damaging would be the last one – regular reporting annually or semi-annually of cases CFIUS has reviewed.

Other proposals have sought to broaden the definition of what constitutes a national security threat. That was one of the hardest fought issues when the process was created, with a number of the conferees arguing vigorously for a broader definition that specifically included "economic" security within the definition of national security. In the end that position did not prevail, and I believe with respect to that issue the Executive Branch has interpreted the law consistent with Congressional intent at that time.

As one of those who argued then for a broader definition, I will not take the opposite view now. One of the characteristics of a globalized economy is that the line between economics and national security is blurred, something that is clear to me from my time in the last Administration running the Department of Commerce's dual use export control program. A narrow definition that focuses only on short term military requirements or homeland security may not be adequate in today's environment.

Any expansion, however, needs to be carefully crafted. Simply adding the word "economic" invites demands that any acquisition be studied from the standpoint of how it would affect that particular industry, even if it were candles or candy. The health of industries that are, however, directly related and essential to national security deserves consideration from a longer term perspective than simply whether the Defense Department's short term needs can continue to be met.

Finally, there have been proposals to change the chairman.. I will not defend – or attack – Treasury's work as chair, but I will say it does not make much difference who is chairman. The process tends to operate consistently – the agency with a problem takes the lead. Originally that was usually the Department of Defense. More recently, it has been the Department of Homeland Security. As long as agencies that identify problems are free to pursue them, and as long as you have a competent neutral convener of the group, then the intent of Congress is being well-served.